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6 UNITED STATES DISTRICT COURT

7 FOR NORTHERN DISTRICT OF CALIFORNIA

8 BAO YI YANG, WEI WANG, AND LIANG
 XIAN FU

9 Plaintiffs,
 10 vs.

11 SHANGHAI GOURMET, LLC, dba
 12 SHANGHAI GOURMET, and DOES 1-10

13 Defendants

14 Case No.: C07-04482 JL

15 **NOTICE OF PLAINTIFF'S MOTION TO
 FOR LEAVE TO FILE SECOND
 AMENDED COMPLAINT;
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 MOTION FOR LEAVE TO FILE SECOND
 AMENDED COMPLAINT**

16 Date: September 9, 2008
 17 Time: 9:30 AM
 18 Judge: Honorable James Larson
 19 Trial Date: None

20 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

21 THE NOTICE IS HEREBY GIVEN that on September 9, 2008 at 9:30 a.m., Plaintiffs will
 22 move for the leave to file the Second Amended Complaint to allege civil penalties under
 23 California Labor Code § 558 on behalf of Plaintiffs themselves pursuant to Labor Code Private
 24 Attorney General's Act, California Labor Code § 2699, *et seq.* ("PAGA").¹

25 This motion is supported by the Memorandum of Points and Authorities in Support of
 26 Plaintiffs' Motion for Leave to File A Second Amended Complaint, the Declaration of Adam
 27 Wang in support thereof, the other records, pleadings, and papers filed in this action; and upon
 28

¹ The Proposed Second Amended Complaint is attached hereto as Exhibit 1.

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1 such other documentary and oral evidence or argument as may be presented to the Court at the
 2 hearing of this motion.

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4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. INTRODUCTION**

6 Plaintiffs Bao Yi Yang, Wei Wang, and Liang Xian Fu were employed by Defendant
 7 Shanghai Gourmet LLC who operated popular Chinese restaurants in Richmond and Walnut
 8 Creek California. During the four years prior to their filing of the Complaint, Plaintiffs were
 9 required to work in excess of 8 hours a day and 40 hours a week on regular basis, but were not
 10 paid required overtime wage. In the current Complaint, Plaintiffs allege violations of California
 11 Labor Code and Fair Labor Standards Act (“FLSA”), seeking unpaid overtime and associated
 12 penalties.

13 In the current First Amended Complaint (“FAC”), Plaintiffs name Shanghai Gourmet
 14 LLC, and its owners—Xu Liang Shen and Bo Juan Liu. Plaintiffs allege individual Defendants
 15 are liable for FLSA liabilities because they were employers of the Plaintiffs having control over
 16 Plaintiffs’ work condition and work situation. See FAC, ¶ 4. As additional theories to hold
 17 individuals liable, the FAC also alleges (i) piercing corporate veil, see FAC, at ¶ 9; and (ii)
 18 fraudulent conveyance, see FAC, at ¶¶ 44-47.

19 This motion seeks to add an additional cause of action for civil penalties and unpaid
 20 wages under California Labor Code § 558 on behalf themselves against Defendant Shanghai
 21 Gourmet LLC as well as individual Defendants Xu Liang Shen and Bo Juan Liu “as persons
 22 acting on behalf the employer.”² This new cause of action serves as an additional theory to hold
 23 individual defendants liable for damages under California Labor Code. While individual
 24 defendants are liable for unpaid overtime under FLSA, due to the different rules in calculating
 25 FLSA overtime and overtime under California Labor Code, particularly when an employee was

² See California Labor Code § 558.

1 paid a fixed sum of salary, like the case here, and worked substantial overtime, California Labor
 2 Code entitles employee to recover substantial more overtime than the FLSA. See Espinoza v.
 3 Classic Pizza Inc., 114 Cal.App.4th 968 (2003). As such, the new cause of action for civil
 4 penalty under California Labor Code § 558 would allow Plaintiffs to recover the full amount for
 5 their unpaid overtime afforded by California law against individual Defendants without having to
 6 prevail on difficult causes of action such as piercing corporate veil and fraudulent conveyance.

7 **II. ARGUMENTS**

8 **A. RULE 15 IS LIBERALLY APPLIED**

9 "Rule 15's policy favoring amendments to pleadings should be applied with 'extreme
 10 liberality.'" DCD Programs, Ltd. v. Leihgton, 833 F.2d 183, 186 (9th Cir. 1987). The underlying
 11 purpose of Rule 15 is to "facilitate decision on the merits rather than on the pleadings or
 12 technicalities." Roth v. Garcia Marquez, 942 F.2d 617, 628 (9th Cir. 1991). It is the party
 13 opposing the motion to amend that "bears the burden of demonstrating that a substantial reason
 14 exists to deny leave to amend." State of Cal. ex rel. Mueller v. Walgreen Corp., 175 F.R.D. 631,
 15 637 (N.D. Cal. 1997) (citing Shipner v. Eastern Air Lines, Inc., 868 F.2d 401, 407 (11th Cir.
 16 1989)). "Unless a substantial reason exists to deny leave to amend, the discretion of the district
 court is not broad enough to permit denial." Shipner, 868 F.2d at 407.

17 As discussed below, because the addition of new cause of action would not add new facts
 18 to the litigation, the proposed amendment will not prejudice the Defendants in any conceivable
 19 way. Accordingly, no substantial reason exists to deny leave to amend.

20 **B. INDIVIDUAL DEFENDANTS ARE LIABLE UNDER CALIFORNIA LABOR CODE § 558**

21 Under California Labor Code § 558, the employer and the person acting on behalf of the
 22 employer are liable for the unpaid wage and unpaid meal premiums collected as civil penalties
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1 pursuant thereto³. In the discovery, Defendants have admitted that individual Defendants Xu
 2 Liang Shen (“Shen”) and Bo Juan Liu (“Liu”) jointly owned 100% of the corporate Defendant
 3 who employed Plaintiffs; and that Shen acted on behalf of CCL in hiring, supervising, paying
 4 Plaintiffs. Defendants also admitted that Shen was responsible for tracking the number of hours
 5 worked by Plaintiffs, and also responsible for calculating the amount of wage due Plaintiffs.
 6 See Wang Decl., at ¶ 4. As such, Defendant Shen was acting on behalf of Plaintiffs’ employer
 7 Shanghai Gourmet LLC, and is thus liable for unpaid wages pursued as civil penalties under
 8 California Labor Code § 558, enforced through Private Attorney General’s Act, Cal Lab. Code §
 9 2269, *et seq.* See Reynolds v. Bement, 36 Cal. 4th 1075, at 1094 (2005) (conc. opn. of Moreno,
 10 J.).

11 **D. PLAINTIFFS HAVE SATISFIED THE REQUIREMENTS OF CALIFORNIA LABOR CODE §
 12 2699.3**

13 California Labor Code § 558 provides for recovery as civil penalty the unpaid wage and.
 14 California Labor Code § 2699 provides that “any provision for a civil penalty to be
 15 assessed , may ... be recovered through a civil action brought by an aggrieved employee
 16 on behalf of himself or herself and other current or former employees pursuant to the procedures
 17 specified in Section 2699.3.” § 2699.3(c) provides that an action under § 558 by an aggrieved
 18 employee may be commenced if the employee gave a written notice by certified mail to

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 20 ³ Labor Code § 558 provides: “Any employer *or other person acting on behalf of an employer*
 21 who violates, or causes to be violated, any provision regulating hours and days of work in
 22 any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows:

23 (1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each
 24 pay period for which the employee was underpaid in addition to an amount sufficient to recover
 25 underpaid wages.

(2) For each subsequent violation, one hundred dollars (\$100) for each underpaid
 24 employee for each pay period for which the employee was underpaid in addition to an amount
 25 sufficient to recover underpaid wages....”(emphasis added)

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1 California Labor and Workforce Development Agency (“CLWDA”) and the employer
 2 specifying the section the employer allegedly had violated, and the facts and theories supporting
 3 the alleged violation; and the employer failed to cure the violation within 33 days of the written
 4 notice by the employee.

5 Plaintiffs have sent a written notice by certified mail to both CLWDA and Defendants
 6 Shanghai Gourmet LLC. Defendant Shanghai Gourmet LLC has not cured its violations
 7 within 33 days of such notice. CLWDA has also issued a letter indicating that it does not intend
 8 to investigate into the alleged violations by Defendants. As such, Plaintiffs may commence
 9 civil action on behalf of themselves and all former and current employees against Defendants
 10 pursuant to California Labor Code § 558. See Wang Decl., at ¶¶ 2-3.

11 **E. DEFENDANTS CANNOT PROVE THAT THE PROPOSED AMENDMENTS ARE FUTILE**

12 In light of the strong policy favoring leave to amend under Rule 15, absent showing that
 13 the amendments sought would be futile, there is no reason that Plaintiffs should not be granted
 14 leave to amend. Bowles v. Reade, 198 F.3d 752, 757-58 (9th Cir. 1999). As defendants are
 15 unable to make such a showing, the Court should allow Plaintiffs to file the proposed SAC.

16 **F. PLAINTIFFS’ PROPOSED AMENDMENT WILL NOT PREJUDICE DEFENDANTS IN
 17 THIS CASE**

18 Plaintiffs’ proposed amendment will not prejudice Defendants in this case. As stated
 19 above, the proposed amendment only adds the cause of action to hold individual Defendants
 20 individually liable for unpaid wages under California Labor Code § 558 pursued as civil
 21 penalties. This cause of action will base on the same facts underlying the claims for unpaid
 22 wages already alleged in the existing complaints. Parties have conducted written discoveries; and
 23 such discoveries have revealed that Defendant Shen had acted on behalf of Plaintiffs’ employer
 24 Shanghai Gourmet LLC. As such, the proposed amendments will not require more resources in
 25 litigating matters unrelated from the causes of actions already alleged in the current pleadings.

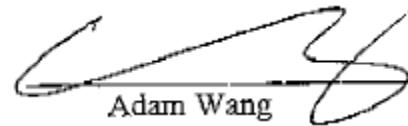
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1 Furthermore, the current Complaints surround around the Defendants' overtime
2 violations. The proposed amendment seeking unpaid overtime wages for themselves will not
3 change the operative facts alleged in current Complaint. As such, Defendants' ability to preserve
4 documents and witness testimony, and prepare the case for trial will not be prejudiced one bit.
5 See Sierra Club v. Penfold, 857 F.2d 1307, 1315 (9th Cir. 1988) (recognizing that "once the
6 defendant is in court on a claim arising out of a particular transaction or set of facts, he is not
7 prejudiced if another claim, arising out of the same facts, is added").

8 **III. CONCLUSION**

9 For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs'
10 motion for leave to file the proposed Second Amended Complaint.

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12 Dated: August 1, 2008
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Adam Wang
Attorney for Plaintiffs

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